IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 903

INDIAN TOWING COMPANY, INC.,
Petitioner,

versus

THURSTON CRAWFORD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED

We emphatically disagree with petitioner's statement that there is here presented an "important question of maritime law". The only question of law involved in this case was answered by this Court in *Postal Steamship Corporation vs. Steamship El Isleo*,[1] wherein Your Honors held that a so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action, and that her right to maintain her privilege ends when danger of collision is

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[1] 308 U.S. 378, 84 L. Ed. 335.

apparent. Obviously dissatisfied with this answer because it is fatal to petitioner's contention, petitioner seeks another examination of the question.

The Court of Appeals found petitioner's vessel so grossly at fault under the *El Isleo* rule, that, applying the "doctrine of last clear chance" or "the rule of causation", respondent's vessel was exonerated under well-established jurisprudence.[2] No other question of law is presented—only questions of fact which, under prior jurisprudence, this Court will not re-examine on certiorari.

Additionally, it is here contended, petitioner is seeking a review based on a non-existent factual situation.

STATUTES INVOLVED

Petitioner cites four statutes as involved in this matter. They are all statutory rules governing navigation. The fourth, Article 25, has no application whatsoever to this case because the collision here involved did not occur in a narrow channel, as we shall hereinafter point out.

There is no question of statutory construction presented at all, and whether or not there were inexcusable violations of the other navigation rules cited by petitioner presents factual questions of a character which Your Honors will not review on certiorari under your jurisprudence. That is of particular moment in this case, since

[2] The statement on page 2 of petitioner's brief that the Court of Appeals abruptly departed from the jurisprudence of this Court by reaching its decision "'under the rules of common sense'—'entirely aside from any rules of admiralty law'" is inaccurate and the quotation is lifted out of context. The Court of Appeals said—"Entirely aside from any rules of admiralty law, it must be apparent that under the rules of common sense this is an accident that should not have happened." Petitioner's brief, page 12. The Court went on to apply the *El Isleo* rule and condemn petitioner's vessel.

the review is sought in connection with what we contend is a non-existent factual situation.

THE CASE

Respondent submits that petitioner has incorrectly stated a basic fact of this case, and has failed to state other basic facts which must be understood before the merits of petitioner's legal argument can be evaluated.

At the outset of its presentation, petitioner states that the collision occurred "in a buoyed-marked, 150 foot dredged channel". This is not accurate. For the Court's convenience, we append to this brief a copy of the United States Coast and Geodetic Survey Chart No. 878, showing the scene of the collision, which took place just to the east of Nun Buoy 48. From this chart it will be noted that the Intracoastal Waterway enters Lake Borgne from the west in the vicinity of Cat Fish Point and then runs generally in a southeasterly direction a distance of approximately two and a quarter statute miles, where it bends to the north and then runs generally in an east-west direction. The dredged or shallow portions of the channel are marked by buoys. From Cat Fish Point easterly to Nun Buoy 48 the channel is dredged with a spoil bank on the south side, but east of Nun Buoy 48 the channel crosses the Rigolets and there is deep water on either side from Nun Buoy 48 to the bend of the channel at Nun Buoy 42 a distance of approximately 1 and 3/20 statute miles.[3]

The collision occurred "200 feet east of nun buoy

[3] " * * * there is ample depth on both sides of the craft for a safe passage to be made. That such deep water is available up the Rigolets is not only apparent from the charts of the area but it is also indicated by a break in the line of buoys that mark the waterway where it follows the dredged channel." Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 13.

48 which, according to the chart, marks the east end of the dredged channel, so that for approximately the next mile there is deep tidal water before the dredged channel commences again".[4]

Petitioner's vessel, the CHEROKEE, on the day of the collision had no tow and was drawing from eight to nine feet. After rounding Nun Buoy 42, she proceeded west in the channel, running on the Rigolets Range. At the same time the Tug SUWANNEE, pushing the Barge COASTAL NO. 7, a 240 foot tank barge loaded with a maximum cargo of petroleum products, was eastbound and had entered Lake Borgne from the west.

As found by the Court of Appeals,[5] Mock, the navigator of the CHEROKEE, then proceeding westerly, light and unencumbered by any tow, first saw the SUWANNEE and her tow proceeding easterly when they were under the influence of the strong tide running southerly out of The Rigolets. The SUWANNEE was then more than a half mile west of the CHEROKEE, which was running in the deep, open and unbuoyed stretch of water between nun buoys 42 and 48. Mock saw that the SUWANNEE, because it was encumbered with its tow, was flanking, i.e., holding the head of its barge up to the northward against the strong tide of The Rigolets. Mock testified he knew this to be necessary and that he would have followed the same course.[6] The CHEROKEE, when only 400 yards separated the vessels, blew the SUWANNEE a one-blast signal for a port to port pas-

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[4] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 10.

[5] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 9.

[6] Opinion of the Court of Appeals, 237 F. 2d 916, Note 1; Petition for Certiorari, p. 10.

sage, but did not then direct its course to its starboard, as it should have done to effect a port to port passage with the SUWANEE and its tow.[7] It continued full speed ahead, blew an unavailing danger signal at 400 feet and, as was to be expected, came into collision with the SUWANNEE's tow.

The CHEROKEE's disregard of "the rules of common sense" was explained by her navigator—"When asked on cross-examination why, when he saw the SUWANNEE angling to the north, as she proceeded eastward, he didn't run up the Rigolets to get out of the way of the other vessel, Mock said: 'Because I ain't got no habit of running from people in the channel.'"[8]

ARGUMENT

To what channel did Mock have reference? Neither the CHEROKEE nor the SUWANNEE and its tow was in any channel, and Mock belied this argument by admitting to a blind reliance on privilege. Because of this flagrantly negligent conduct of Mock, amounting to a willful refusal to yield an inch of his imagined, but nonexistent privilege in order to avoid a collision, the Court of Appeals held the CHEROKEE solely at fault, citing *The Cornelius Vanderbilt* (2 Cir.), 120 F. 2d 766, and *The Sanday* (2 Cir.), 122 F. 2d 325.[9] As stated by the Court of Appeals,[10] "Whether this be called an applica-

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[7] "By the time the SUWANNEE met the CHEROKEE its tow had passed out of the dredged part of the waterway and was in open water which bespoke for it the assumption that the port to port passage signalled by the CHEROKEE would be completed by the latter craft's going north of the line of the waterway to effect it." Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 14.

[8] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 11.

[9] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 15.

[10] Opinion of the Court of Appeals, 237 F. 2d 916; Petition for Certiorari, p. 15.

tion of the doctrine of last clear chance or the rule of causation, makes little difference. Where as here, an act [the conduct of the SUWANNEE] is negligent, but is not the proximate cause of the injury, it is merely a condition. As such it is not a basis of liability. *P. Dougherty Co. v. United States* (3 Cir.), 207 F. 2d 626." Your Honors refused a writ of certiorari in the *Dougherty-United States* Case.[11]

Petitioner has had its day in Court and is now merely seeking another review of factual matters that were fully considered by the two Lower Courts. If there is any legal proposition involved here, it is one which has been heretofore, and as recently as 1940, fully considered and stated by this Court.

In *Postal Steamship Corporation vs. Steamship El Isleo, supra*, the Court said:

> "The plain purpose of the Inspectors' rules is to minimize the danger of collision. The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action. Her right to maintain her privilege ends when there is danger of collision and in the presence of that danger both vessels must be 'stopped and backed if necessary, until signals for passing with safety are made and understood'."

The decision of this case, therefore, involves nothing more than an application of the doctrine of the *El Isleo* to the action of the navigator of the CHEROKEE in refusing "to run from people in the channel". The rule was correctly applied by the Court of Appeals for the

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[11] 347 U.S. 912, 74 S. Ct. 476.

Fifth Circuit.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SELIM B. LEMLE,
Proctor for Respondents,
1836 National Bank of
Commerce Building,
New Orleans 12, Louisiana.

Of Counsel:
LEMLE & KELLEHER
GEORGE B. MATTHEWS

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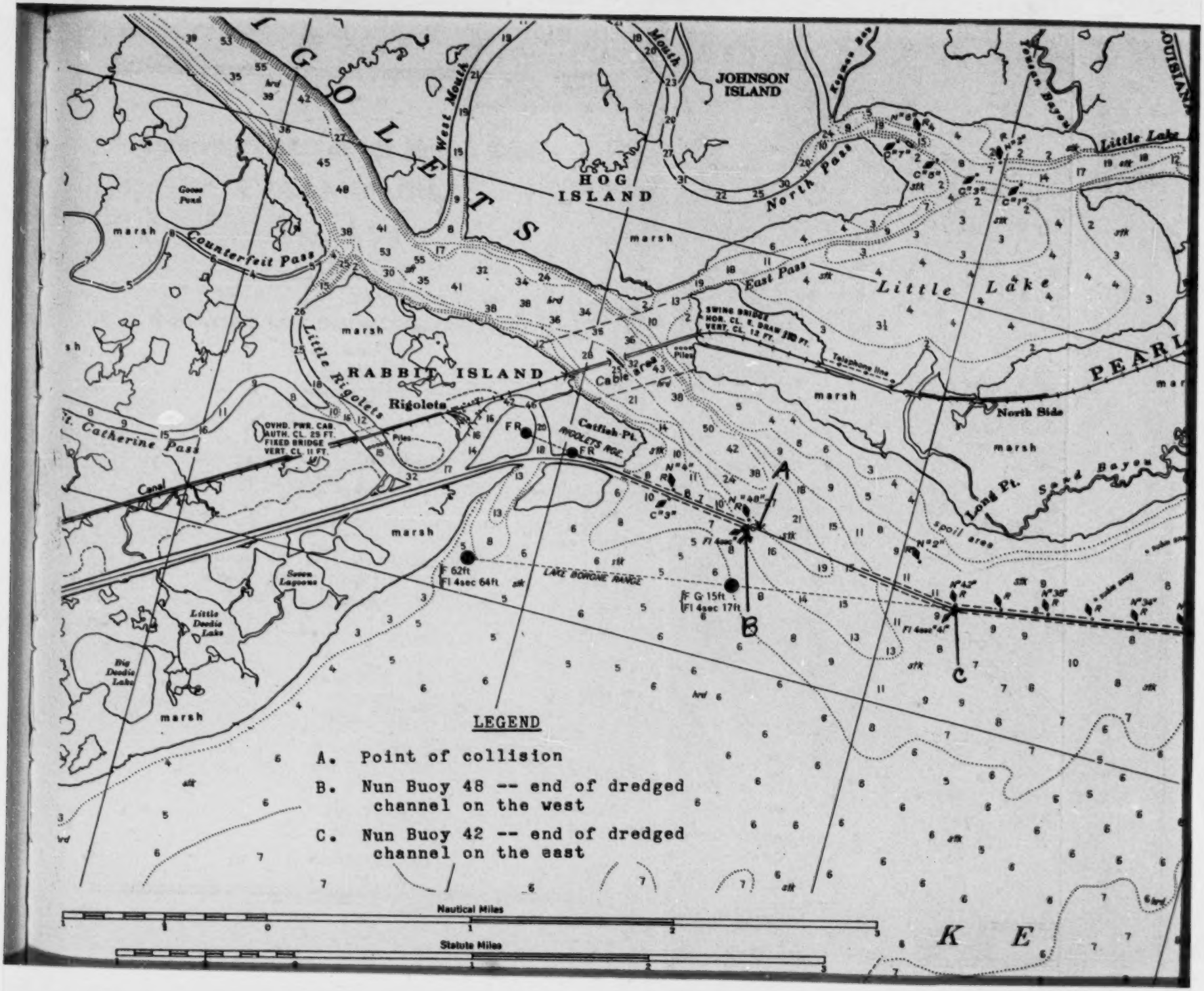
[12] While the Court of Appeals disposed of this case under the doctrine of "last clear chance" or the "rule of causation", it might with equal propriety have disposed of it and held the CHEROKEE, which was light and unencumbered by any tow, solely at fault for not navigating in a manner so as not to embarrass the SUWANNEE, which was encumbered with a large and heavy tow; *The Mayumba*, D.C., 21 F. 476; *The Rose Culkin*, D.C., 52 F. 328; *The Lucy*, 4 Cir., 74 F. 572; *The Georgetown*, D.C., 135 F. 854; *The Westhall*, D.C., 153 F. 1010; *The Maine*, D.C., 2 F. 2d 605; *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 26 Cal. 2d 365, 159 P. 2d 1.


RIGOLETS
West Mouth
JOHNSON ISLAND
HOG ISLAND
North Pass
Little Lake
Goose Pond
marsh
Counterfeit Pass
East Pass
Little Lake
SWING BRIDGE
HOR. CL. E. DRAW 150 FT.
VERT. CL. 12 FT.
Telephone line
Piles
Little Rigolets
RABBIT ISLAND
Cable area
PEARL
Rigolets
North Side
Long Pt.
Spoil Bayou
OVHD. PWR. CAB.
AUTH. CL. 25 FT.
FIXED BRIDGE
VERT. CL. 11 FT.
Catfish Pt.
RIGOLETS RGE.
FR
Canal
spoil area
F 62ft
Fl 4sec 64ft
LAKE BORGNE RANGE
F G 15ft
Fl 4sec 17ft
Seven Lagoons
Little Deedie Lake
Big Deedie Lake
A
B
C
LEGEND
A. Point of collision
B. Nun Buoy 48 -- end of dredged channel on the west
C. Nun Buoy 42 -- end of dredged channel on the east
Nautical Miles
Statute Miles
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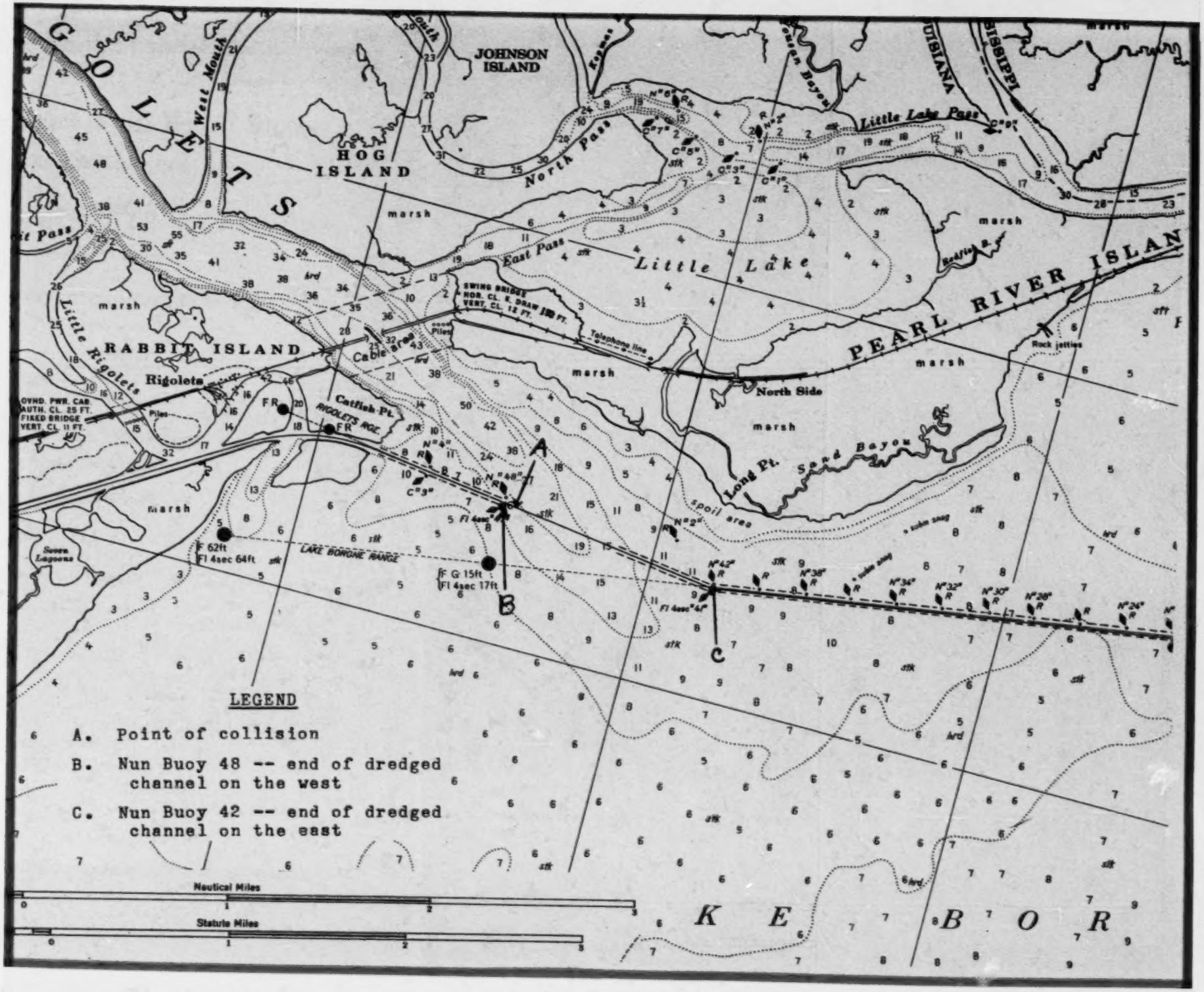
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HOG ISLAND
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